



United States Tax Court
Washington, DC 20217

Lawrence W. Doyle & John F. Moynihan,)
)
 Petitioners)
) Docket No. 4865-19W.
 v.)
)
 Commissioner of Internal Revenue,)
)
 Respondent)

ORDER

This is a whistleblower case under section 7623(b). Petitioners filed a whistleblower award claim with the IRS’s Whistleblower Office (WBO); but the Commissioner contends that the IRS did not, on the basis of petitioners’ information, initiate a proceeding against the target entities identified by petitioners or collect tax proceeds from the target entities. In October 2020 we issued an opinion in this case, T.C. Memo. 2020 139 (Doc. 61, denying the Commissioner’s motion for summary judgment); and in this order we assume familiarity with that opinion. Now pending before the Court are (1) the Commissioner’s motion to remand (Doc. 63), (2) petitioners’ application (Doc. 59) to take the deposition of a State official, and (3) petitioners’ motion (Doc. 67) to compel production of documents.

I. Background

A. Previous opinion and order

The Commissioner previously moved for summary judgment on the dual grounds that “the IRS [1] did not proceed with an administrative or judicial action against the [target] Entity and [2] did not collect any proceeds based on petitioners’ claims. We denied the motion (see Doc. 61) because (1) the WBO’s determination was not based on the non collection of proceeds, so the Commissioner may not rely on that supposed ground to defend the determination in this litigation, and (2) the WBO’s determination that the IRS’s Criminal Investigation Division did not “proceed[] with any * * * action” for purposes of section 7623(b)(1) was not supported by the administrative record and thus constituted an abuse of discretion.

Before we issued that opinion, petitioners had filed their “Application for Order to Take Deposition to Perpetuate Evidence” (see Doc. 59); and after we issued that opinion, the Commissioner filed a motion to remand the case to the WBO for further consideration (Doc. 63). We therefore--

ORDERED that ... petitioners shall file a response to the Commissioner's motion to remand, in which petitioners shall recommend a schedule for further proceedings. In composing that response and recommendation, they shall keep in mind part II.B.1 of our opinion (slip op. at 24 26 [explaining that the Tax Court does not review the IRS’s decision whether to audit a target and has no authority to require the IRS to explain a decision not to audit]) and the Supreme Court’s holding in *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) [“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation”]. It is further

ORDERED that ... petitioners may file a reply to the Commissioner's response (Doc. 62) to petitioners' application to take deposition (Doc. 59). [Doc. 64.]

B. The Commissioner’s motion to remand

The Commissioner’s motion to remand acknowledges (Doc. 63 at 5):

18. With respect to the question of whether CI proceeded with an administrative action based on information brought to the Secretary’s attention by petitioners, the Court ruled that the administrative record before the Court did not support the WO’s conclusion that CI did not conduct an investigation of the target using petitioners’ information.... Accordingly, the WO must further investigate to determine whether CI proceeded with an investigation based on petitioners’ information and collected proceeds within the meaning of I.R.C. section 7623.

19. As described above, the administrative record in this case is not fully developed. Moreover, there are facts and information, uniquely within the knowledge of the Whistleblower Office that need to be considered in connection with the resolution of petitioner’s claim.

Consequently, the Commissioner asks us to remand the case to the WBO for further consideration. Petitioners object to the motion to remand and state (Doc. 65 at 9-10):

52. Petitioners contend that the Respondent's request has been made in bad faith in an effort to further delay this matter.

53. The Petitioners disagree with Respondent that remanding the matter will conserve the Court's and the parties' time and resources because it is unlikely, based on the previous actions by the Respondent, the end result will be any different.

54. Petitioners argue the opposite, that a remand will simply delay the matter and will end up in the same place. The Respondent has shown it cannot be trusted with performing its duties as mandated by the laws of the United States of America.

55. Petitioners believe that proceeding with trial is in the best interests of all parties involved, including the Court's.

As they elsewhere explain, "Petitioners are ready to go to trial to uncover the information Respondent refuses to provide that Petitioners have reason to believe will support the evidence they compiled in their complaint." (Doc. 82 at 8.)

C. Petitioners' application for deposition

Petitioners allege that a State agency conducted an investigation of the former accounting firm for the target entities. They allege that the director of that State agency refused to honor a "FOIA request" (presumably a public records request under State law) served on him by petitioners. They have filed with this Court a Form 15, "Application for Order to Take Deposition to Perpetuate Evidence" (see Doc. 59), requesting permission under Rule 81(a) to take the director's deposition. As justification for their request, petitioners advance two grounds, the latter of which is now moot: (1) "Petitioners believe that the audit showing accounting irregularities will strengthen their argument that the Respondent did not investigate the Petitioners' Whistleblower submission as claimed"; and (2) that the deposition would "provide the Court with the information needed to deny the Respondent's motion for summary judgment".

The Commissioner has opposed (see Doc. 62), contending, *inter alia*, that “action by a state agency is not the equivalent of the Secretary proceeding with an action based on the whistleblower’s information”. The Commissioner further contends that such evidence would not meet the legal standard applicable for the Tax Court to consider such evidence, as it is beyond the scope of the administrative record and not within any of the categories of evidence with which we may properly supplement the administrative record.

Petitioners have replied (see Doc. 65), complaining of the IRS’s “failure to proceed based on the information provided by Petitioners”, asserting that “Respondent failed to properly investigate the matter, as is clearly shown in the administrative record”, and improperly “limit[ed] its review of the Petitioners’ claim”. Petitioners contend that “Respondent acted with such an abuse of discretion that it rises to the level of a dereliction of duty. Based on the thread bare administrative record it is easy to conclude that the Respondent purposely ignored the evidence presented by the Petitioners.” Though Petitioners oppose the Commissioner’s motion for remand, they agree that the administrative record is incomplete.

D. Petitioners’ motion to compel

Petitioners’ motion to compel (Doc. 67) seeks numerous broad categories of documents over decades, beginning with a request for -

Any and all subpoenas issued to and document requests of the United States Internal Revenue Service by any and all issuing United States governmental agencies, Foreign governmental agencies and/or courts involving private citizen concerns, in regard to the ... [target] entities covering the period from 1997 to today.

Their requests include documents pertaining to individuals, governmental agencies, and private entities, most of which are unrelated to the target entities. A few of petitioners’ requests seek documents pertaining to specific claim numbers assigned to the petitioners’ claim, but the bulk of the requests are for information generated during a nearly 24-year period as it may pertain to the target, its activities, and any investigations into the target generally, without requiring any nexus to petitioners’ claim.

The Commissioner has objected, arguing that petitioners are not entitled to the information they seek and that a remand (not discovery proceedings) would be the most expeditious way to address the purported insufficiency of the administrative record. (Doc. 78) He further argues (and the petitioners do not dispute) that

petitioners did not comply with Rule 72 prior to filing their motion to compel because they served no formal discovery requests upon the Commissioner, and indeed no such requests or proof of service are appended to the petitioners' motion.¹

Petitioners have replied (Doc. 82), asserting that "Respondent had more than enough time" to respond to their first informal request. They do not dispute that they did not serve formal discovery on Respondent, but they argue that the time that had elapsed since their first of two informal discovery requests should suffice. They continue to allege bad faith on the part of the Commissioner and argue that consequently their requests are wholly justified, urging that we deny a remand and "Compel the Respondent to Participate in Informal Discovery".

II. Discussion

A. Petitioners' discovery motions

Under section 7623(b), the actual issue in this case is not whether the target entities underpaid their proper tax liabilities but whether the IRS "proceed[ed] with any administrative or judicial action [against the target entities] ... based on information [that petitioners] brought to the Secretary's attention" and then "collected proceeds * * * resulting from the action".

However, petitioners do not appear to contend that the IRS used their information to proceed against the target entities and thereby collected tax proceeds. Rather, they complain that the IRS did not proceed with an action and therefore did not collect proceeds. That is, "Since Respondent chose not to investigate for whatever reason, Petitioners spent, and continue to spend, countless hours investigating the target entity and compiling information for the Respondent's use." (Doc. 82 at 7.) By their application to take the State official's deposition and by their motion to compel, petitioners seek to obtain information in order to prove that the IRS erred by not pursuing against the target (or not pursuing well) an audit that (they assert and we can

¹ The Commissioner argues that the motion to compel is therefore "moot". We interpret the substance of his argument to be that the issue is not yet ripe, because petitioners have not met the conditions that, under our rules, must precede to a motion to compel. See Rule 72(b) (providing the procedure to serve formal discovery and stating that "[t]o obtain a ruling on an objection by the responding party, on a failure to respond, or on a failure to produce or permit inspection, the requesting party shall file an appropriate motion with the Court and shall annex thereto the request, with proof of service on the other party, together with the response and objections if any.")

assume arguendo) petitioners had amply justified. Petitioners evidently look forward to a trial at which they hope to prove wrong-doing and tax evasion by the target entities and to prove dereliction of duty by the IRS. There will be no such trial in this case.

Petitioners evidently persist in their previously expressed wish that we would review the IRS's decision not to audit and, when we see how deficient its process was, that we would "direct the appointment of an independent investigator outside of the Internal Revenue Service to review this submission due to the clear abuse of discretion present in this matter or, alternatively, direct the Whistleblower Office to assign new investigators within the office under the review of a U.S. Tax Court appointed monitor to review the claim[s]." (Doc. 21 at 13.) But as we previously explained (see Doc. 61 at 19 20, 25), "such 'monitor[ing]' or take over of the IRS's audit function is plainly outside the power we have been granted." See also Cline v. Commissioner, T.C. Memo. 2020 35, at *15, and other authorities cited therein.

Consequently conducting depositions or obtaining documents for use in proving the target's alleged wrong-doing and the IRS's supposed malfeasance in declining to act on that information would be outside the scope of proper discovery. To the extent that petitioners' motion to compel seeks documentation pertaining to the investigation of their specific claim at issue in this case, it is unclear from the parties' briefings whether this information may already be part of the administrative record (which both sides contend is incomplete). Further, it is clear that petitioners have not, as a matter of procedure, perfected their request to move the Court for discovery. Petitioners' request that we compel the Commissioner to engage in informal discovery is redundant in the sense that such conduct is already required. See Rule 70(a). Further, we cannot compel specific requests for production on the basis of an informal request; to do so would circumvent our Rules. We will therefore deny petitioners' application to take the deposition of a State official and their motion to compel.

B. The Commissioner's motion for remand

We previously denied summary judgment to the Commissioner because we held that the administrative record did not show definitively whether CI had used petitioners' information to proceed against the target entities (and whether any tax proceeds might thereafter have been collected). It seems clear that we should remand the case to the WBO so that it can explore this gap. Petitioners have not shown any reason we should conclude otherwise.

Petitioners complain (Doc. 65 at 8) that the administrative record compiled by the Commissioner is incomplete. However, they have not yet filed any motion to

correct or supplement that record, and since we are remanding the case to the WBO, petitioners will be in a position to cure defects in the record in that supplemental proceeding before the WBO.

For the reasons stated above and in the Commissioner's filings, it is

ORDERED that petitioners' application to take the deposition of a State official (Doc. 59) and motion to compel (Doc. 67) are denied. It is further

ORDERED that the Commissioner's motion to remand (Doc. 63) is granted, and this case is remanded to the IRS's Whistleblower Office for further consideration of petitioner's claim--specifically, for investigation and development of the record to determine whether CI proceeded with an investigation based on petitioners' information and collected proceeds within the meaning of section 7623. It is further

ORDERED that, no later than June 18, 2020, the parties shall file a joint status report (or, if that is not expedient, then separate reports) that shall include their recommendations as to a schedule for further proceedings in this case.

**(Signed) David Gustafson
Judge**